Supreme Court ruling could pave way for federal union challenge on right to strike

Kathryn May, Ottawa Citizen, January 30, 2015

A historic Supreme Court of Canada ruling that affirms workers' right to strike opens the door for 17 federal unions to launch a similar constitutional challenge of the Conservative government's changes to labour laws in the public service.

In a 5-2 majority, the Supreme Court found the right to strike is an "indispensable" part of collective bargaining and struck down as unconstitutional a Saskatchewan labour law that prevented public servants from striking.

"The right to strike is not merely derivative of collective bargaining; it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction," Justice Rosalie Abella wrote for the majority in the 5-2 ruling.

The ruling granted an appeal Friday by the Saskatchewan Federation of Labour of the province's controversial essential services law, which restricted which workers could strike.

A constitutional right to strike is a major change to Canada's labour laws that was applauded by the unions and labour organizations across the country.

The ruling will affect public service unions in provinces across the country. Last April, Nova Scotia enacted its own essential services law for health care workers, joining Newfoundland and Labrador and British Columbia as provinces with such laws.

It also delivered a severe blow to the Conservative government's overhaul of the labour laws that govern collective bargaining in the federal public service. The changes, passed in Bill C-4, are almost identical to the Saskatchewan legislation that the Supreme Court overturned, particularly the provisions dealing with essential services.

"With the passage of Bill C-4, federal public service employees are faced with very similar legislation which grants the government carte blanche over essential services designations, leaving bargaining agents with little recourse," said Debi Daviau, president of the Professional Institute of the Public Service of Canada.

“This decision is a direct challenge to this Conservative legislation, which has imposed the most radical changes to federal public service labour relations in 40 years.”

Federal unions have been waiting for the ruling since the government introduced changes to the Public Service Labour Relations Act in 2013. The biggest union, Public Service Alliance of Canada, filed a constitutional challenge then arguing the law violated employees’ right to freedom of association. Many expect the other unions will now follow suit or join the PSAC case.

PSAC president Robyn Benson said the Conservatives’ legislation is so similar to the Saskatchewan law that she hoped Treasury Board President Tony Clement would correct the “error of his ways” and repeal the “ill-conceived” law.

“This is an important victory for all working people,” said Benson. “If the government repealed (C-4), I would be overjoyed, but if not we will proceed with our case.”

Stephanie Rea, director of communications for Clement, said the government is studying the decision.

“As the decision in the case has just been rendered by the Supreme Court of Canada, we will be studying the decision carefully, with the Canadian taxpayer in mind,” she said in an email.

The Saskatchewan Party came to power in 2007 and introduced a new law, which said employers and unions had to agree on workers deemed essential and unable to legally strike. If the two sides couldn’t agree, the government gets to decide who is an essential.

Abella wrote that such unilateral power violated freedom of association guaranteed by the Charter of Rights and Freedom.

The federal law also gave the government the right to decide who is essential in the event of a strike. Unions have 30 days to comment on that list but the government makes the final decisions.

Before the Conservatives’ changes, the two sides negotiated essential services agreements and if they disagreed over what jobs should be designated, the dispute went to the labour relations board to sort out.

The court’s decision also found that employees can’t effectively bargain if there isn’t an impartial dispute resolution mechanism to solve any impasses at the negotiating table. Unlike the Saskatchewan law, the federal law allows unions access to arbitration but only in cases where 80 per cent of employees have been designated essential.

“Given the breadth of essential services that the employer is entitled to designate unilaterally without an independent review process, and the absence of an adequate, impartial and effective alternative mechanism for resolving collective bargaining impasses, there can be little doubt that

the trial judge was right to conclude that the scheme was not minimally impairing," said the decision.

Peter Engelmann, a lawyer for the Professional Institute of the Public Service of Canada, said the federal government "will have a difficult road to hoe" if it decides to defend its law in light of the ruling. He argued the most "rational" response would be for the government to consult with unions, revisit the law and fix it to conform with the ruling.

The 17 federal unions are currently in a highly contentious round of bargaining over with the government under the rules that the court found unconstitutional in Saskatchewan.

The Supreme Court gave Saskatchewan one year to enact new legislation.

Top court upholds Canadian workers' right to strike

SEAN FINE, The Globe and Mail, January 30, 2015

Canadian workers have a constitutional right to strike, the Supreme Court ruled Friday morning.

"The right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations," Justice Rosalie Abella wrote for the majority in a 5-2 ruling.

Governments are permitted to limit the right to strike for essential workers, but no more than necessary, the majority said. It also said that not all public-sector workers should necessarily be considered to do essential services.

The ruling comes in a Saskatchewan case in which public-sector unions challenged a 2008 provincial law passed by Premier Brad Wall's Saskatchewan Party that limited the right to strike by workers deemed by the government to be in essential services, such as jail guards. In the previous two decades, Saskatchewan had ordered striking public-sector workers back to the job on 10 separate occasions. But the law gave the government the unilateral right to decide which workers were essential, and it denied them access to effective alternatives for resolving labour disputes, Justice Abella said.

"The right to strike also promotes equality in the bargaining process," she wrote. "This Court has long recognized the deep inequalities that structure the relationship between employers and employees, and the vulnerability of employees in this context. While strike activity itself does

not guarantee that a labour dispute will be resolved in any particular manner, or that it will be resolved at all, it is the possibility of a strike which enables workers to negotiate their employment terms on a more equal footing."

The case is the latest of several – including one two weeks ago – in which the Supreme Court has reconsidered its employer-friendly rulings from 1987 that found no constitutional right to collective bargaining or joining a union, and no right to strike. Overturning the first two of those rulings, the court established a right to meaningful collective bargaining in in 2007, and then this month ruled that the Canadian government unfairly denied Mounties their right to unionize.

Declaring a constitutional right to strike would be a change of "seismic proportions" to Canadian labour law, the Saskatchewan Attorney-General's Ministry told the Supreme Court in its written argument. It would affect labour laws around the country. Saskatchewan said it could even jeopardize matters such as the prohibition on strikes during the life of a collective agreement; the requirement to hold a strike vote by secret ballot before a strike action; and the requirement to give at least 48 hours written notice of any strike action.

At issue is Section 2(d) of the Charter of Rights and Freedoms, which protects freedom of association. The Supreme Court gave that right a ringing endorsement in the Mountie union case this month, reaching back to the words of a liberal-minded dissenting judge from 1987 – chief justice Brian Dickson – who said that association enables those "who would otherwise be vulnerable and ineffective to meet on more equal terms the power and strength of those with whom their interests interact and, perhaps, conflict."

The Saskatchewan Federation of Labour cast its argument in similar terms. "The right to withdraw labour is a universal human right," it said. "The recognition of the importance of work in a person's life [by the Supreme Court] requires the Court in applying the Charter to protect the ongoing ability of employees to find meaning and fulfillment in their employment relationships. The collective action of workers in work stoppages in pursuit of common goals is how workers exercise autonomy and participate in self-government in the workplace. These values play a central role in the interpretation of both freedom of association and expression."

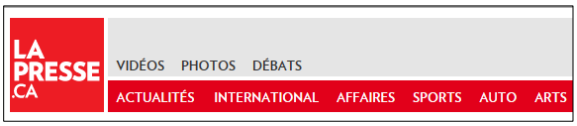
The case attracted a variety of unions and governments intervening to make arguments on both sides of the issue.

The British Columbia Civil Liberties Association said the freedom of association should be understood in its relationship to freedom of expression. "By collectively withdrawing their labour in order to further their common goals, workers are engaging in conduct that is both associational and expressive in nature. They are banding together, in pursuit of their common interests. That is associational. And in doing so, they are, among other things, communicating a position to their employer, and perhaps others, such as members of the public, and seeking to persuade them to accept their collective bargaining goals. That is expressive."

The Canadian Constitution Foundation, a conservative advocacy group, said the right to strike is created by government through laws, and governments have the authority to change those laws if they wish. Such rights [as the right to strike] involve a significant intrusion upon the

constitutional role of the legislatures, and involve courts in complex matters of economic regulation," the group said in its written argument filed with the court.

The Saskatchewan trial judge who heard the case ruled in favour of a right to strike, but the province's Court of Appeal overturned that ruling, saying only the Supreme Court could overturn its earlier precedent.



Une loi sur les services essentiels est invalidée par la Cour suprême

La Presse, Presse Canadienne, le 30 janvier 2015

La Cour suprême du Canada a tranché qu'une loi provinciale sur les services essentiels qui restreint le droit de grève des employés du secteur public est inconstitutionnelle, ce qui va vraisemblablement avoir un impact important sur une loi similaire qui existe au Québec.

Dans un jugement 5-2 rendu vendredi, le plus haut tribunal du pays a ainsi déterminé que le droit de grève constitue un élément essentiel d'un processus véritable de négociation collective et l'a en quelque sorte constitutionnalisé.

L'équilibre des forces employé-employeur dans les relations de travail est ainsi modifié de façon substantielle.

La loi qui a fait l'objet de l'étude attentive de la Cour suprême était celle adoptée par la Saskatchewan en 2008. La province soutenait que sa loi protège la sécurité de la population en cas de grève.

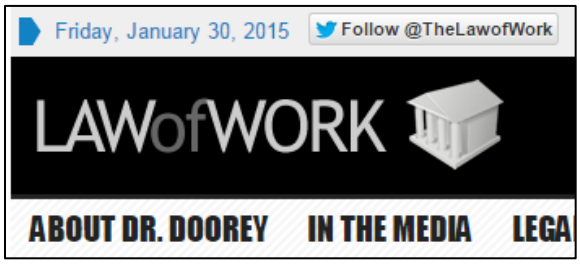
La Cour suprême a suspendu la déclaration d'invalidité de la loi pour un an, donnant ainsi du temps à la Saskatchewan pour rédiger une nouvelle mouture de sa loi.

Elle a eu pour effet de limiter la capacité des employés du secteur public qui fournissent des services essentiels de faire la grève. Ainsi, la loi a créé une méthode dite de «grève contrôlée» encadrant le retrait des services essentiels en établissant un régime destiné à limiter le nombre de salariés qui ont le droit de refuser de travailler en cas de grève.

De nombreux syndicats et de fédérations de travailleurs ont contesté la constitutionnalité de cette loi, soutenant qu'elle porte atteinte aux droits et libertés garantis par la Charte canadienne des droits et libertés, notamment la liberté d'association et la liberté d'expression.

De grandes entreprises comme Air Canada sont intervenues dans les procédures et les gouvernements de plusieurs provinces comme le Québec ont aussi fait valoir leurs arguments, sentant leurs propres lois sur les services essentiels menacées.

En première instance, le juge a tranché que la loi était invalide. Cette décision a été infirmée en Cour d'appel, qui s'est jugée liée par la jurisprudence établie selon laquelle la liberté d'association ne comprend pas le droit de grève.



A Constitutional Right to Strike Comes to Canada!

Law of Work blog page, January 30, 2015

A famous labour law professor told me once that sometimes you write decisions or public commission reports with an eye to the future. Sometimes you lay the ground work for future generations. Today, the Supreme Court of Canada finally accepted that Chief Justice Brian Dickson was right back in 1987, when he argued in his famous dissent in the Alberta Reference case that "freedom of association" in Canada's Charter must protect a right of workers to withdraw their labour in combination to pressure their employer in collective bargaining. Today, nearly 30 years later, the Constitutional right to strike came to Canada.

The case challenged draconian legislation enacted by the Saskatchewan Party that gutted collective bargaining rights of public sector workers, and permitted employers to unilaterally decide which employees would have a right to strike and which would not. The Saskatchewan government, and governments in Ontario (see Dunmore), B.C. (see B.C. Health Services) have no one to blame for this decision by themselves. In their haste to strip workers of the right to collective bargaining, they overreached, went far beyond what was necessary to protect the public interest, to win some small points with their political base, to show that they are 'tough as nails against labour', and that they could do whatever the hell the liked, because there is no constitutional protection of a right to collective bargaining or strike.

By stripping marginalized farm workers of any right to bargain, by ripping up collective agreements and prohibiting bargaining over key subjects, and by effectively removing any right of employee resistance or access to a fair and neutral system of interest arbitration, these

governments demonstrated with great flair the absolute hollowness of a freedom to associate that protects neither a right to collectively bargain or strike. In their arrogance, they gave labour the perfect test cases to ask the Court to revisit the 1987 Labour Trilogy. Had the governments taken a more measured, fair, and respectful approach, we may not be here today.

And so we enter a new era in which governments will be expected to justify the necessity of stripping workers of the right to bargain collectively and to strike.

Today's decision was somewhat anti-climatic, notwithstanding its obvious significance. The Court showed its hand in last week's MPAO v. Canada decision, which all but told us what was coming. By adopting Chief Dickson's dissent in the Alberta Reference as the correct approach to Section 2(d), it seemed unimaginable that it would not also adopt the conclusion that followed from that approach, that Section 2(d) protects a right to strike.

As it had done in B.C. Health Services, where a right to collective bargaining was first recognized, the SCC relied on history and international law to justify the recognition of a right to strike. The lessons to be taken from that review include the conclusion that "without a right to strike, a constitutional right to bargain collectively is meaningless."

The right to strike is constitutionally protected "because of its crucial role in a meaningful process of collective bargaining". In a key passage, the SCC wrote:

Abella J.: This historical, international, and jurisprudential landscape suggests compellingly to me that s. 2 (d) has arrived at the destination sought by Dickson C.J. in the Alberta Reference, namely, the conclusion that a meaningful process of collective bargaining requires the ability of employees to participate in the collective withdrawal of services for the purpose of pursuing the terms and conditions of their employment through a collective agreement. Where good faith negotiations break down, the ability to engage in the collective withdrawal of services is a necessary component of the process through which workers can continue to participate meaningfully in the pursuit of their collective workplace goals. In this case, the suppression of the right to strike amounts to a substantial interference with the right to a meaningful process of collective bargaining.

The test, according to the SCC is this:

Abella J.: The test, then, is whether the legislative interference with the right to strike in a particular case amounts to a substantial interference with collective bargaining. The PSESA demonstrably meets this threshold because it prevents designated employees from engaging in any work stoppage as part of the bargaining process. It must therefore be justified under s. 1 of the Charter .

It will take some time to flesh out what the case means. It appears to mean at first glance that a complete statutory ban on the right to strike will now violate Section 2(d), and the analysis will turn to Section 1 and the question of whether the infringement is justified. This is similar to the Court's long-standing approach to freedom of expression in Section 2(b), where most of the heavy legal lifting takes place under Section 1. The section 1 analysis will include an assessment

of whether there is an adequate dispute resolution process, such an independent interest arbitration, when workers' right to strike is limited. Does this have the effect of constitutionalizing a right to interest arbitration?

Abella J.: Where strike action is limited in a way that substantially interferes with a meaningful process of collective bargaining, it must be replaced by one of the meaningful dispute resolution mechanisms commonly used in labour relations.
In Saskatchewan, the SCC ruled that the legislation in question was not saved by Section 1, because it was over broad in sweeping in employees who were not essential at all, and because it offered no fair alternate dispute resolution process at all for the workers whose right to strike had been taken away.

Many questions remain. I have to digest the decision for a while, but off the top of my head, here's a few:

1. What does this decision mean for the Ontario Court of Appeal ruling in Association of Justice Counsel v. Canada, which was denied leave to the SCC. That ruling found that the constitutional obligation on the government to bargain with its employees' association ends after a reasonable period of bargaining has occurred and an impasse is reached. At that point, the employer/state can unilaterally impose whatever terms it likes. That conclusion was premised on the assumption that the test for Section 2(d) is that the law makes it "effectively impossible" to engage in collective bargaining, and that there is no Constitutional right to a dispute resolution process. The "effectively impossible" test was killed in MPAO, replaced by "substantially interferes", and Saskatchewan now makes clear that in fact there is a right to strike or a right to access a meaningful dispute resolution process. This suggests that Association of Justice Counsel would be decided differently now. All of this could spell trouble for Alberta, which is trying to defend its controversial Public Sector Salary Restraint Act.

2. Is the Agricultural Employees Protection Act, barely upheld in Fraser, now unconstitutional, because it does not grant any protected right to strike or access to any alternative dispute resolution process to agricultural workers?

3. Can employee associations that function outside of the Wagner model (because they are excluded from the legislation), like the union representing Legal Aid Lawyers, now strike when their public sector employer ignores their requests to engage in bargaining?

4. About 65% of Canadian employees and 83% of private sector employees are non-union, and have no legally protected right to strike in Canada. That is, if nonunion workers go on strike in this country, there is no statutory protection from termination by their employer. Only workers unionized in a majority trade union have a legally (statutorily) protected right to strike. Does this Saskatchewan decision, read with Dunmore and Fraser, which created a positive duty on governments to protect Charter rights in some cases, mean that nonunion workers (or at least some of them) must now be a afforded some form of statutory right of non-reprisal for engaging in a strike? Do we need a law that protects nonunion Walmart workers from being fired if they strike to try and win

better wages? Or can governments still only grant the constitutional right to strike to about a 17% of private sector employees?

One thing's for sure: labour lawyers will have a lot more constitutional litigation on their plates in the coming years.

Lastly, I'd like to note two points about the importance of legal academics. Firstly, over a dozen labour law scholars were cited by the Court in this case and last week's decisions, and labour law scholars helped set the foundation for the Court's reasoning for both the majority and dissenting decisions. Second, the leading peer reviewed law journal on work law–the Canadian Labour & Employment Law Journal–was cited 10 times in this decision. I play a small role on that journal as Articles Review Editor, but credit must go out to Kevin Banks (and Bernie Adell (RIP), Jeffrey Sack and his people at Lancaster House, and Queens Law students who work on the journal.

With right to strike, the Supreme Court returns balance to the workplace

HASSAN YUSSUFF, Contribution to The Globe and Mail, January 30, 2015

Hassan Yussuff *is president of the Canadian Labour Congress*

The Supreme Court has reaffirmed the centrality of collective bargaining and the right to strike to Canadian democracy. In a 5-2 decision, the Court has ruled that the right to strike is protected by the Canadian Charter of Rights and Freedoms.

This is a courageous decision, one that all Canadians should celebrate.

The decision is an important win for all of us because it recognizes once again that there is a fundamental power imbalance in the workplace that favours employers over employees, and that the right to strike restores balance and promotes equality in the bargaining process.

Does this mean we'll see more strikes? Of course not. No union goes into bargaining looking to send their members out on strike. As the Court recognizes, "strike action has the potential to place pressure on both sides of a dispute to engage in good faith negotiations." What it does mean is that employers and unions alike will collaborate more and that more negotiations will successfully conclude with fair collective agreements.

The decision strikes down legislation that the Saskatchewan government hoped would allow it to sidestep that collaborative approach completely. The legislation meant the government could unilaterally determine which workers were essential and which were not. It removed all possible recourse for the workers affected. It was devoid of any independent, effective dispute-resolution process, and handcuffed the Saskatchewan Labour Relations Board.

As the Court ruled, "no other essential services agreement in Canada comes close to prohibiting the right to strike as broadly, and as significantly."

There is no justification for this approach. Unions and employers have successfully used a collaborative approach to negotiate essential service agreements time and again. And time and again unions have fully agreed that some services are essential to the public good.

The Court found "no evidence to support Saskatchewan's position that the objective of ensuring the continued delivery of essential services requires unilateral rather than collaborative decision making authority."

Strikes will always be the last resort in collective bargaining. But it's strikes that make the news. The reality is that the vast majority of collective agreements – 94 per cent in the federal jurisdiction alone – are settled without a work stoppage.

This decision won't change the labour movement's commitment to protecting public health and safety during labour disputes. Health providers, emergency services workers, and critical infrastructure workers will continue to put the safety and well-being of the public first.

We should also take pride, as Canadians, that this brings our law in line with Canada's international commitment to the right to strike. Canada is a party to United Nations conventions recognizing the right to strike, as well as International Labour Organization Convention no. 87 concerning freedom of association and the right to organize. These undertakings commit Canada to upholding the right to strike.

This decision comes on the heels of another Supreme Court decision last week that recognized the right of the RCMP – indeed all workers in Canada – to choose independent associations to engage in meaningful collective bargaining. That confirmed what workers have known instinctively all along; that the right to choose an independent association to engage in collective bargaining forms the essence of freedom of association.

This week, the Court has recognized again that in effect, workers collective rights are human rights. As the decision says, the right to strike is essential to realizing Charter values of "human dignity, equality, liberty, respect for the autonomy of the person and the enhancement of democracy."

As Justice Abella wrote in the Court's decision, "clearly the arc bends increasingly towards workplace justice."